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No. _____

In The
Supreme Court of the United States
October Term, 1995

GOOL COUNTS,

Petitioner

– vs. –

JESSE BROWN, Secretary
of Veterans Affairs,

Respondent.

**On Petition For A Writ of Certiorari
To the United States Court of Appeals
for the Federal Circuit**

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

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QUESTIONS PRESENTED

1. Does the Federal Circuit Court of Appeals have jurisdiction to hear appeals from the Court of Veterans Appeals where the questions presented involve "mixed" questions of statutory interpretation and the application of law to facts?

2. Does a veteran have a property interest protected by the Due Process Clause of the Fifth Amendment in receiving disability benefits?

3. Does the Government violate a veteran's Fifth Amendment Due Process Rights when it loses the veteran's service related medical records and then denies service related disability benefits because of "missing records" and further fails to comply with express Congressional commands with respect to administering veterans' benefits?

PARTIES TO THE PROCEEDING

GOOL COUNTS,

Petitioner,

vs.

JESSE BROWN,

Secretary of Veterans Affairs,

Respondent.

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The opinion of the United States Court of Appeals for the Federal Circuit is reprinted in the Appendix at 1. The opinion of the Court of Veterans Appeals is reported in Counts v. Brown, 6 Vet. App. 473 (1994) and is reprinted in the Appendix at 5.

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JURISDICTION

The decision of the Federal Circuit Court of Appeals was entered on September 1, 1995. This Petition for Certiorari was filed within 90 days of the date of the Court of Appeals order. Accordingly, this petition is filed within the time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case presents a question of statutory interpretation of 38 U.S.C. § 7292(d). This section provides:

(1) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any

regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Veterans Appeals that the Court of Appeals for the Federal Circuit finds to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or
(D) without observance of procedure required by law.

(2) Except to the extent an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

This case also involves the Due Process Clause of the Fifth Amendment which provides that:

No person shall be . . . deprived of life, liberty, or property, without due process of law.

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STATEMENT OF THE CASE

Gool Counts entered active service in the United

States Army on July 28, 1943, and was honorably discharged on December 14, 1945. Mr. Counts was a member of the Sixth Engineer Special Brigade. Mr. Counts participated in three campaigns during his period of service, Normandy, Northern France and Central Europe. He received many decorations for his participation in these Campaigns including the following: a World War II Victory Medal; an ATO Medal; a Good Conduct Medal; a Distinguished Unit Badge; and a Bronze Arrowhead. (A., When Mr. Counts entered the army in 1943, his physical examination showed him to be in perfect physical health.

On April 25, 1944, while on active duty, Mr. Counts was injured in a truck accident. Mr. Counts was admitted to the hospital ward by litter on April 25, 1944, as he was unable to walk. Mr. Counts spent a period of nine days in the hospital due to his injuries. On May 3, 1944, Mr. Counts was released from the hospital back to regular duty. Mr. Counts explained the reason for his release as follows:

> I was hospitalized...April 25, 1944 for nine days. Due to the invasion of Normandy being near at hand, the hospital had orders to release all men that was able to participate in this undertaking if they could get about at all. I was one of these men.

> They told me I could get further treatment after the invasion of France. Aside from them pulling two teeth, no other treatment ever come.

On November 30, 1945, Mr. Counts underwent a physical examination prior to his discharge from the Army. This examination was conducted by Major Robert B. McNulty at Camp Shelby, Mississippi. During this examination, Major McNulty prepared a three page "Report of Physical Examination of Enlisted Personnel Prior to discharge from Active Duty or Retirement". The Report of Physical Examination was prepared as the examining doctor's and enlisted man's account of the enlisted man's physical condition at the time of discharge. Included in this assessment was the question contained in the Report of Physical Examination at line 10 "Are you at the present time, disabled or suffering from any wound, injury or disease, whether or not incurred in the military service. If yes, list those conditions under line 11". Mr. Counts answered "yes" to this question. Although Army regulations required examination by a board of review under these circumstances, such an examination never took place. The Board of Review ultimately gave cursory attention to Mr. Counts' case, and specifically found that

"hospitalization for further study, treatment, and/or disposition" was necessary. However, Mr. Counts did not at that time, or any other time undergo the "study, treatment, and/or disposition" called for by the Board of Review. Mr. Counts was discharged prior to receiving this study, treatment and/or disposition.

Mr. Counts filed his first claim for service-connected disability compensation in December, 1945. On May, 4, 1946, he was awarded benefits of $11.50 per month, based upon a ten percent rating for his tender hernia scar. However, he was denied benefits for his back condition because "the back condition was not disclosed by the examination disclosed [sic] at time of discharge." That denial was based "on incomplete records" and "upon receipt of additional records", Mr. Counts was advised that his case would be reviewed and he would be notified of the action taken." The record is devoid of any reference to what (if any) attempt the VA made to locate the "missing records" or to "review Mr. Counts' case." Mr. Counts has continued to seek service-connected disability compensation for the back injuries he sustained in the truck accident since 1946. These claims have been denied, based on the Governments lack of records to substantiate the claim.

In October 1988, Mr. Counts submitted two new medical records obtained from Hospital Admission Card data files created by the Office of the Surgeon General as new and material evidence in support of his claim. One of these records shows that an unnamed individual identified by Mr. Counts' service number was hospitalized in the "central, South Pacific" in May 1944 with a diagnosis of chronic cystitis and stricture of the urethra. The other record indicates that an individual with Mr. Counts' service number was hospitalized in April 1944 with a diagnosis of lacerated wound(s) and abraded wound(s) as a result of a motor vehicle accident. The second of these documents relates to Mr. Counts. The first does not. Mr. Counts contended that these records were new and material because they tended to offer explanations as to how records of his 1944 hospitalization could have been lost or misfiled.

Mr. Counts filed his original claim for service connected disability benefits in December of 1945. Following enactment of the Veterans Judicial Review Act in 1988, Mr. Counts attempted to convince the Department of Veterans Affairs to reopen his claim for disability benefits connected with his back injury, which it declined to do. Mr. Counts filed his timely Notice of Appeal with

the Court of Veterans Appeals on July 29, 1991.

The Court of Veterans Appeals in Counts v. Brown, 6 Vet.App. 473 (1994) denied Mr. Counts' claim for residuals of injuries he sustained in a truck accident on April 25, 1944, while he was on active duty in the service. In denying Mr. Counts's claim, the Court of Veterans Appeals stated that: 1) the service records presented by Mr. Counts show that Mr. Counts was hospitalized in April 1944 following a motor vehicle accident and a veteran with the same service number as Mr. Counts had been hospitalized for chronic systitis and stricture of the urethra in Central America during the same year were not new and material evidence that required reopening Mr. Counts' claim; 2) Mr. Counts did not establish a breach of the Veterans Affairs statutory duty to assist him in recovering documents and records which supported his claim; and 3) the VA's failure to notify Mr. Counts of his obligation for obtaining private medical records which the VA had notice of was harmless error. This decision is attached at Appendix 5. Mr. Counts then filed his timely Notice of Disagreement and Motion for Review en banc on August 8, 1994. The Court of Veterans Appeals denied this Motion in its final judgment, from which Mr. Counts

appealed on September 9, 1994.

In his appeal to the Federal Circuit Court of Appeals Mr. Counts presented and briefed the following questions for review:

I. Whether the Court of Veterans Appeals erred in Interpreting 38 U.S.C. § 5108 where both the Court of Appeals and the Secretary failed to follow the clear intent of Congress with respect to reopening claims where new and material evidence has been presented with respect to a previously disallowed claim;

II. Whether the Court of Veterans Appeals erred in interpreting 38 U.S.C. § 5107 where both the Court of Appeals and the Secretary of Veterans Affairs failed to follow the clear intent of Congress regarding assisting Mr. Counts with his claim for disability benefits arising from his April 25, 1944 war related injuries;

III. Whether the Court of Veterans Appeals erred in interpreting 38 U.S.C. § 5107(b) because the Court failed to give Mr. Counts the benefit of the doubt as required by this statute; and

IV. Whether the Government's failure to Assist Mr. Counts with respect to his claim for World War II disability benefits and failure to reopen his claim for benefits in light of changes in the law has deprived him of due process of law guaranteed to him by the 5th Amendment to the United States Constitution.

On August 7, 1995, pursuant to order of the Federal Circuit Court, counsel for Mr. Counts argued the case orally in Washington, D.C. At oral argument, Mr. Counts' counsel argued that the Government's failure to follow its own regulations with respect to Mr. Counts' discharge physical, in not assisting him with respect to the missing hospital records and in failing to afford him the benefit of the doubt as specifically required by Congressional enactments, denied Mr. Counts due process rights afforded to him by the Fifth Amendment to the Constitution. During oral argument, counsel for the government conceded that no effort was made to locate Mr. Counts' missing service records, even after Counts had submitted the records indicating that another serviceman in the South Pacific had his same service number. Counsel for the government also conceded that Mr. Counts' missing service records could very well be found in the file which was brought to the attention of the Government by Mr. Counts.

On September 1, 1995, the Federal Circuit Court of Appeals, per Judges Mayer, Clevenger and Rader, dismissed Mr. Counts appeal on the grounds that Mr. Counts "challenges only factual determinations or the

application of law to the facts of his case and does not present a genuine constitutional issue or a challenge to the validity or interpretation of a statute or regulation." App. 1. The panel further held that Mr. Counts' constitutional issue did not invoke jurisdiction of the Court pursuant to 38 U.S.C. § 7292(d)(2) because "he does not offer authority to support his assertion that he has a constitutionally protected property interest in veterans benefits." Appendix at 2. This appeal followed.

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ARGUMENT

I. THE DECISION OF THE FEDERAL CIRCUIT COURT OF APPEALS THAT IT DOES NOT HAVE JURISDICTION TO HEAR APPEALS WHICH INVOLVE MIXED QUESTIONS OF STATUTORY INTERPRETATION AND THE APPLICATION OF LAW TO FACTS DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT.

A. HISTORICAL BACKGROUND

Legislation providing relief for soldiers and sailors disabled while serving their country has been traced to Elizabethan England and a statute providing pensions to veterans since 1588, the year of the Spanish Armada.

Legislative History: P.L. 100-687, "Veterans' Judicial Review Act-- Veterans' Benefits Improvement Act of 1988," U.S.C.C.A.A.N. 100th Cong. 2d Session 1988, vol. 7, p. 5790. The American colonies continued this tradition of providing pensions to maimed and disabled soldiers. Id. Shortly after the Declaration of Independence, the Continental Congress promised to provide pensions to those disabled in the cause of the American independence. Id. The first Congressional enactments providing benefits to Revolutionary War veterans did not specify any procedure for the administration of the benefits, causing Congress to allow all claims. Id. In 1792, Congress delegated the duties of deciding whether a veteran's disability was service connected and, if so, determining the extent of the disability to the Circuit Courts of the United States. Id. The Circuit Justices of the time were mostly of the opinion that Congress could not require the judiciary to make such determinations, and, consequently, the law was subsequently revised to vest decision making in the Secretary of War. Id. See also Bloch and Marcus, John Marshall's Selective Use of History in Marbury v. Madison, 1986 Wis. L. Rev. 301. From the beginning of

the Republic, then, the courts and Congress have clashed over the proper way to adjudicate claims for veterans benefits. Legislative History: P.L. 100-687, "Veterans' Judicial Review Act-- Veterans' Benefits Improvement Act of 1988," U.S.C.C.A.A.N. 100th Cong. 2d Session 1988, vol. 7, p. 5790. More often than not, courts disclaimed any proper role in the adjudication of veterans' benefits claims. Id. Over the years, Congress has declared its views that there should be no judicial remedy with respect to claims for veterans benefits. Id. This policy was honored for nearly 170 years. Id.

In this context, it is a recent phenomena that courts have become involved in reviewing the correctness of administrative agency decision-making. Id. at 5790-91. In point of fact, administrative agencies such as the Veterans' Administration were created to meet a need for fair and efficient administration of the various laws regulating government benefits. Id. at 5791. As the administrative agencies became more powerful, affecting an increasing number of citizens and economic interests, however, the power of the judiciary was invoked to "control government intrusions into private liberty and property interests." Id., quoting Breyer and Stewart,

Administrative Law and Regulatory Policy, p. 28 (2d. Ed. 1985). Notwithstanding the increasing role of the courts in defining the extent of administrative agencies' powers, Congress has long precluded, without dissent by the courts, judicial review of veterans benefits claims. Legislative History: P.L. 100-687, "Veterans' Judicial Review Act--Veterans' Benefits Improvement Act of 1988," U.S.C.C.A.A.N. 100th Cong. 2d Session 1988, vol. 7, p. 5791.

Although the passage of the Administrative Procedure Act in 1946 required standardization of many procedures used by administrative agencies, the Veterans' Administration was effectively exempted from the APA's requirements. Id. As a result, one commentator observed that, [prior to passage of the Veterans' Judicial Review Act], the Veterans' Administration stood in "splendid isolation as the single federal administrative agency whose major functions are explicitly insulated from judicial review." Id., quoting Rabin, Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis, 27 Stanford L. Rev. 905 (1975).

In 1988, this Court decided Traynor v. Turnage, ___ U.S ___, 99 L.Ed. 2d 618, 108 S.Ct. 1372 (1988)

which, at least in the view of the authors of the Veterans' Judicial Review Act provided the foundation for judicial review of Veterans' Administration decision making similar to review accorded to other agencies. The report of the House Committee on Veterans' Affairs, included in the legislative history of the Veterans' Judicial Review Act states in part:

> With all due respect to the Court's efforts to accede to the policy judgment originally made by the Congress in 1887 and ratified in 1924, 1933, 1940, and 1970, the Court's opinion in Traynor would inevitably lead to increased involvement of the judiciary in technical VA decision-making. Notwithstanding the fact that the language of section 211(a) is cited as the model for preclusion of review statutes, the courts seem to have little regard for the eroding effect that decisions such as Traynor have on the independence of the executive branch. Because courts always have "the final say" on questions of law, and because the modern trend to make all administrative decisions reviewable, it appears that Congressional efforts to preclude certain forms of judicial review must be periodically revised. And since at present the courts have arrogated the power to determine whether the Administrator exceeds his authority, as well as whether he reached the proper legal conclusion on a given set of facts, the ineluctable result is that the courts will eventually feel free to review any challenge to the Administrator involving a question

> of law. While the committee believes that Johnson v. Robison [415 U.S. 361 (1974)] was correct in asserting judicial authority to decide whether statutes meet constitutional muster, the reasoning of that case has taken the courts further into individual decision making than Congress heretofore intended. The statement of Justice White noting that the VA is free to seek appropriate relief from Congress if VA matters begin to burden the courts with expensive and time consuming legislation ignores the complaint of most judges (and the Judicial Conference has so testified before this committee) that the courts already have far too many cases to handle.

Legislative History: P.L. 100-687, "Veterans' Judicial Review Act-- Veterans' Benefits Improvement Act of 1988," U.S.C.C.A.A.N. 100th Cong. 2d Session 1988, vol. 7, p. 5803-04. (House Report No. 100-963, p. 22).

From this perspective then, Congress apparently sought to limit full scale judicial review of Veterans' Administration action by enacting "remedial legislation" ironically intended to limit the scope of judicial review which the Committee believed would develop on its own course without Congressional action. The Committee on Veterans' Affairs also apparently intended to preclude judicial review of "mixed" questions of fact and law:

> The committee is concerned with restoring the

> proper balance between the executive and judicial branch with respect to the adjudication of veterans' claims. It is clear from the testimony before the committee that judges do not wish to take on the very technical and specialized task of applying a well established body of law governing the adjudication of veterans' claims to thousands of factual disagreements which arise between the VA and claimants. The committee also notes that at times courts alternate between doctrines that give appropriate deference to administrative fact finding processes and doctrines that call for strict scrutiny or a hard look at difficult factual situations. This is especially true when the review of factual determinations is precluded, but takes place in any event on the premise that the question is a "mixed" question of law and fact. The committee believes that there is a harmful effect which results from inconsistency in the level of deference given to administrative fact-finding, for it defeats the goals of accuracy and fairness if courts do not adhere to a strict standard of deference. . . . It is only through such deference that the three branches of government can continue to coexist.

Legislative History: P.L. 100-687, "Veterans' Judicial Review Act-- Veterans' Benefits Improvement Act of 1988," U.S.C.C.A.A.N. 100th Cong. 2d Session 1988, vol. 7, p. 5806-07. (House Report No. 100-963, p. 25).

Donald L. Ivers, then General Counsel of the Veteran's Administration, testified prior to passage of the

Veterans' Judicial Review Act, that:

> Judicial review in the Federal courts would produce inconsistency and delay. It has been observed "the courts are not well equipped to determine such factual issues as whether or not injury is service-connected or to determine other medical or technical questions, which are of a type the Veterans Administration confronts all of the time uniformly." [cites omitted]. The courts, including the courts of appeals, tend to differ on procedural rules, evidentiary requirements, and interpretation of substantive law. Thus, judicial review in the Federal Courts may be expected to yield inconsistent case law and geographically based decisions. Predictability and consistency are essential to claimants' perception of fairness. A system that produces surprise outcomes or in which results depend upon where the parties reside will appear to be unjust and arbitrary.
>
> The increase in the caseload of the Federal Courts brought about by enactment of judicial review legislation would also threaten the quality and timeliness of decisions. Likening VA claims to Social Security cases, the Judicial Conference has warned:
>
> > Because of the large numbers of criminal cases and others that have priority, the Social Security cases mover very slowly through the court system, and it is not unusual to find an appeal in the court of appeals involving a claim filed five or more

> years prior to submission of the appeal to the three-judge panel. This delay is extremely undesirable. However, because of the heavy caseload of the courts, such delay is inevitable.

Legislative History: P.L. 100-687, "Veterans' Judicial Review Act-- Veterans' Benefits Improvement Act of 1988," U.S.C.C.A.A.N. 100th Cong. 2d Session 1988, vol. 7, p. 5829-30. (House Report No. 100-963, pp. 48-49). It was with this background that the Veterans' Judicial Review Act -- Veterans' Benefits Improvement Act of 1988 was passed. The final version of the bill, as enacted was intended to:

> (1) Abolish limitations on fees that an attorney may charge a veteran for representing the veteran once the Veterans' Administration has made a final decision on a claim. The Court of Veterans Appeals could review and reduce a fee if it finds that such fee is excessive or unreasonable;
>
> (2) Establish an independent Court of Veterans Appeals in lieu of the existing Board of Veterans' Appeals, similar to the Court of Military Appeals and the United States Tax Court, to rule on all disputes involving the Veterans' Administration and veterans;
>
> (3) Provide for review by the Court of Appeals for the Federal Circuit of any legal matter relied on by

> the Court of Veterans Appeals in making a decision in a particular case. *This would include constitutional, statutory, and regulatory matters, and interpretations of law;* and
>
> (4) Allow challenges by organizations or individuals of VA regulations and other interpretive rules under the Administrative Procedure Act by the Court of Appeals for the Federal Circuit.

Legislative History: P.L. 100-687, "Veterans' Judicial Review Act-- Veterans' Benefits Improvement Act of 1988," U.S.C.C.A.A.N. 100th Cong. 2d Session 1988, vol. 7, p. 5785-86. (House Report No. 100-963, p. 4).

Emphasis supplied.

B. 38 U.S.C. § 7292(d)(2) was not intended to, and cannot preclude review of mixed questions of statutory interpretation and application of law to facts without rendering the Veterans' Judicial Review Act a nullity and violating well established separation of powers principles.

38 U.S.C. § 7292(d)(2) provides that:

> Except to the extent an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

The Federal Circuit Court of Appeals concluded that

because Mr. Counts "challenges only factual determinations or the application of law to the facts of his case and does not present a genuine constitutional issue or a challenge to the validity or interpretation of a statute or regulation" that it did not have jurisdiction to decide Mr. Counts' appeal on its merits (although briefing and oral argument on the case had been completed). This interpretation of § 7292(d)(2) is not consistent with the actual language of the provision, Congressional intent concerning judicial review of mixed questions of law and fact or with sound separation of powers doctrine.

Although Congress has specifically allowed the Federal Circuit Court of Appeals to reverse decisions of the Court of Veterans Appeals that it finds to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," the interpretation given by the panel to § 7292(d)(2), allows the Court to shirk its responsibility for judicial review by making the simple determination that the issue involving "factual determinations" or "the application of law to facts." This standard, as applied by the panel in this case, provides a mechanism to facilitate true "arbitrary and capricious" decision making as virtually all legal disputes involve some degree of "application of

law to facts." In the present case, counsel for Counts cannot conceive of any statutory interpretation issues that do not involve some degree of factual application.

The legislative history of the Veterans Judicial Review Act clearly shows that Congress was not concerned with Judicial over reaching with respect to statutory and constitutional interpretation, but rather with technical factual issues which are best left to agency expertise. The factual questions involved in this case are simple, non-technical and undisputed. Specifically, whether the records produced by Mr. Counts were "new and material," whether the Secretary performed his "duty to assist" Mr. Counts, and whether Mr. Counts was afforded the "benefit of the doubt" in light of the factual history of his case. Congress has provided clear direction with respect to each of these areas and it is clearly within the province of the reviewing court to determine whether the agency has complied with the Congressional commands.

Moreover, Congress did not intend the construction of § 7292(d)(2) given by the Federal Circuit panel in this case. The concern over judicial review of Veterans Administration decision making focused on whether or not the non-adversarial, predictable, fair and efficient nature of

the existing system would be upset by the introduction of lawyers and courts into the decision making equation, not with preventing judicial review altogether, which the Court of Appeals' construction effectively does in this case.

The link between legitimate administrative law functions and the Madisonian system of checks and balances has aptly been explained as follows: "[t]he Anglo-American separation of powers principle ... reserves a special role for an independent judiciary," a role consisting of the exercise of "a reviewing function to ensure executive compliance with the applicable public law, [by] policing executive officers' obedience to legislative commands." S. Breyer & R. Stewart, Administrative Law and Regulatory Policy, p. 38 (1979). This Court reinforced this characterization of the role of the judiciary in Immigration & Naturalization Service v. Chadha, 462 U.S. 919, 103 S.Ct. 2764, 77 L.Ed. 2d 317 (1983) where some of the basic premises of the separation of powers doctrine were set forth. This Court emphasized that "the Executive's . . . administrative activity cannot reach beyond the limits of the statute that created it," and that "[t]he courts when a case or controversy arises, can always 'ascertain whether the will of Congress has been

obeyed,' and can enforce adherence to statutory standards." Id. at 103 S.Ct.2785, n. 16, quoting Yakus v. United States, 321 U.S. 414, 425 (1944). The Chadha court further emphasized that "[e]xecutive action under legislatively delegated authority . . . is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review." Id.

Legislative provisions that attempt to preclude the judiciary from reviewing executive compliance with limits on executive authority therefore directly contradict the separation of powers doctrine. See Note: "Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation of Powers," 97 Harv. L. Rev. 778, 786 (1984). As the author of that note observed, "Madison argued that the objective of separation of powers is 'to provide some practical security for each [branch] against invasion by the others.'" Id. citing The Federalist No. 48, at 332 (J. Madison). The author further observes that "[a] statutory preclusion provision presents just such an invasion: through the provision, Congress abolishes the independent judicial check on the executive and allows the executive to 'judge' itself. Judicial

deference to a preclusion provision effectively turns our tripartite system of government into a bipartite one with respect to federal programs to which the preclusion applies. Id.

The need for an independent judicial "policing" function can be illustrated through an examination of the constitutional character of delegated executive authority. Id. Under the non-delegation principle, itself a corollary of the separation of powers doctrine, this Court has required that any congressional delegation of authority allowing the executive to take action affecting traditional liberty or property interests be accompanied by enforceable rules. Id. citing Breyer & Stuart, pp. 37-38. The note correctly observes that, "[i]f separation-of-powers doctrine requires that delegations of authority be accompanied by limits-- legislative or administrative-- to protect against executive arbitrariness, it follows that separation-of-powers doctrine must also prohibit Congress from precluding judicial enforcement of those limits." Id. at 786-87. Accordingly, even if Congress intended the interpretation given by the Federal Circuit panel in Mr. Counts' case, such an interpretation should be corrected by this Court to comport with well established separation of powers

doctrine.

II. THE SUPREME COURT HAS NOT, BUT SHOULD, DETERMINE WHETHER VETERANS HAVE A PROTECTED PROPERTY INTEREST IN VETERANS' BENEFITS.

A. Due Process, at a minimum, requires the Government to comply with the express commands of Congress in administering veterans benefits.

Although this case involves a claim for a benefit rather than a termination of a benefit, certain due process principles relating to the latter are worth noting. The due process clause of the Fifth Amendment of the United States Constitution requires that when an individual is to be deprived of a property interest as a result of federal government action, the aggrieved party must be provided with notice and an opportunity to be heard. See Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 901, 47 L.Ed.2d 18 (1976); Fugere v. Derwinski, 1 Vet.App. 103, 108 (1990). Opportunity to be heard must be accorded " 'at a meaningful time and in a meaningful manner.' " Mathews 424 U.S. at 333, 96 S.Ct. at 902 (citations omitted). The termination of a veteran's benefit is an example of such a property interest: It is now well

recognized that "the interest of an individual in continued receipt of [Social Security disability] benefits is a statutorily created 'property' interest protected by the fifth amendment." Mathews v. Eldridge, 424 U.S. 319, 332, 96 S.Ct. 893, 901, 47 L.Ed.2d 18] (1976).... The Supreme Court has noted that veterans benefits, entitlement to which is established by service to country at great personal risk, are "akin to Social Security benefits." Walters v. National Assoc. of Radiation Survivors, 473 U.S. 305, 333 [105 S.Ct. 3180, 3195, 87 L.Ed.2d 220] (1985); Fugere, 1 Vet.App. at 108; see Devine v. Cleland, 616 F.2d 1080 (9th Cir.1980) (VA educational assistance allowance constitutes a property right protected by the fifth amendment due process clause); Plato v. Roudebush, 397 F.Supp. 1295 (D.Md.1975) (veteran's widow's benefits constitute a property right protected by the fifth amendment due process clause). Although the Supreme Court has not yet ruled on the extent to which applicants for, rather than recipients of, government benefits have property rights in their expectations, see Lyng v. Payne, 476 U.S. 926, 942, 106 S.Ct. 2333, 2343, 90 L.Ed.2d 921 (1986); Walters v. Nat'l Assoc. of Radiation Survivors, 473 U.S. at 312, 105 S.Ct. at 3184,

some lower federal courts have accorded due process rights to applicants. See, e.g., Ressler v. Pierce, 692 F.2d 1212, 1214-16 (9th Cir.1982) (applicant for federal rent subsidies); Kelly v. R.R. Retirement Bd., 625 F.2d 486, 489-90 (3d Cir.1980) (applicant for disabled child's annuity under Railroad Retirement Act); Butland v. Bowen, 673 F.Supp. 638 (D.Mass.1987) (applicant for social security disability benefits); Dealy v. Heckler, 616 F.Supp. 880, 884-86 (W.D.Mo.1984) (applicant for social security disability benefits).

In Walters v. National Association of Radiation Survivors, 473 U.S. 305 (1985) this Court held that limiting attorneys fees to $10 in veterans cases pursuant to 38 U.S.C. §3404(c) (1984) did not deprive veterans of their rights to due process under the Fifth Amendment to the United States Constitution. The essence of the argument rejected by the Supreme Court in Walters was that the $10 fee limit effectively precluded veterans from obtaining the assistance of counsel, and such preclusion resulted in depriving veterans of a property interest protected by the Fifth Amendment without due process of law. Walters, 473 U.S. at 312-313. This Court, per Justice Rehnquist, rejected that contention. Walters, 473

U.S. at 305. Central to the reasoning in Walters, however, were the propositions that Congress intended that the system of dispensing veteran's benefits, "should be as informal and nonadversarial as possible," [1] that "the VA is required to read any submission in the light most favorable to the claimant," [2] "the [Board of Veterans Affairs] is required to assist a claimant in developing the facts pertinent to his claim," [3] and "the Board is directed by regulation to resolve all reasonable doubts in favor of the claimant."[4]

This version of the operation of the Veterans Administration is not the version experienced by Mr. Counts. As the facts, previous arguments, and briefs below indicate, the process to date has been something less than the "informal and non-adversarial" process envisioned by Congress and comprehended by Justice Rehnquist in Walters. What is clear from Walters and the history of veterans benefits, (which have been available to all veterans

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[1] Walters, 473 U.S. at 323.

[2] 473 U.S. at 329.

[3] 473 U.S. at 310.

[4] Id.

disabled while serving their country since the American Revolution), is that Mr. Counts has a protectable Fifth Amendment property interest in receiving these benefits. and that the Veterans Administration has not afforded him the due process to which he is entitled either by statute, Veterans Administration regulations, or by regulations of the former Department of Veterans Affairs.

With respect to the current process due to Mr. Counts, the facts show that he has not been afforded the minimum protections prescribed by Congress with respect to the benefit of the doubt standard, the duty to assist and the duty to reopen claims upon receipt of "new and material" evidence. These deprivations constitute a violation of Mr. Counts' Fifth Amendment rights to Due Process.

B. Due Process prohibits the Government from denying veterans benefits to a veteran where the Government's failure to maintain its own records forms the basis for the denial of benefits.

This Court has recently recognized that in some contexts, involving non-fundamental rights, the due process clause of the Fourteenth Amendment imposes a substantive standard of reasonableness. See TXO Production v.

Alliance Resources Corp., ___ U.S. ___, 113 S.Ct. 2711, 125 L.Ed. 2d 366 (1993); Honda Motor Co. v. Oberg, ___ U.S. ___, 114 S.Ct. 2331, 129 L.Ed. 2d 336 (1993). The record in this case is clear that the denial of benefits to Mr. Counts is based on missing records which were in the charge of the Government, not Mr. Counts. Such a position is untenable and in violation of Mr. Counts' due process rights under the Fifth Amendment.

CONCLUSION

For the foregoing reasons, this Court should settle the important issues of interpretation presented with respect to 38 U.S.C. § 7292(d) and with respect to the issues raised by Mr. Counts concerning his rights under the Due Process Clause of the Fifth Amendment.

Respectfully submitted,

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October, 1995

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

95-7004

GOOL COUNTS,

Claimant-Appellant,

v.

JESSE BROWN,

Secretary of Veterans Affairs,

Respondent-Appellee.

Before MAYER, CLEVENGER, and RADER, Circuit Judges.

PER CURIAM.

ORDER

Gool Counts appeals a May 27, 1994, judgment of the Court of Veterans Appeals affirming the denial of his claim by the Board of Veterans Appeals.

Counts served in the Army on active duty from July 28, 1943, to December 14, 1945. On April 25, 1944, he was hospitalized for injuries sustained when a truck in

which he was a passenger overturned. On November 30, 1945, Counts was given a physical exam prior to his release from active duty, and he reported residuals of a herniorrhaphy he had received in November 1944 and pain in his shoulders and back from the truck accident. Counts was denied service connection benefits for residuals of his injuries. In 1988, he sought to reopen his case. The Board of Veterans Appeals denied his claim on April 15, 1991, on the ground that the evidence he submitted was not new and material, was repetitious of evidence previously of record, and did not relate to the disabilities at issue.

Under 38 U.S.C. § 7292, this court may review only challenges to the validity or interpretation of a statute or regulation, or to the interpretation of a constitution provision, that the Court of Veterans Appeals relied on in its decision. If an appeal to this court from the Court of Veterans Appeals does not challenge the validity or

interpretation of a statute or regulation, or the interpretation of a constitutional provision, section 7292(d) requires the court to dismiss the appeal. That section states that this court "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case."

Counts argues that section 7292(d)(1) gives the court jurisdiction to decide "all relevant questions of law, including interpreting constitutional and statutory provisions." However, he challenges only factual determinations or the application of law to the facts of his case and does not present a genuine constitutional issue or a challenge to the validity or interpretation of a statute or regulation. Moreover, Counts himself characterizes the facts as "undisputed." He also argues that this court has jurisdiction under section 7292(d)(2) because his case presents a "constitutional issue." However, he does not offer authority to support his assertion that he has a

constitutionally protected property interest in veterans benefits. For these reasons, jurisdiction is improper under 38 U.S.C. § 7292 and this appeal must be dismissed. See, e.g., Spencer v. Brown, 17 F.3d 368, 374 (Fed. Cir. 1994); Livingston v. Derwinski, 959 F.2d 224, 225-26 (Fed. Cir. 1992).

Accordingly,

IT IS ORDERED THAT:

(1) The case is dismissed.

(2) Each side shall bear its own costs.

Sep 1 1995

Filed
U.S. Court of Appeals For
The Federal Circuit
Sep - 1 1995
Francis X. Gindhart
Clerk

ISSUED AS A MANDATE: Oct 24, 1995

UNITED STATES COURT OF VETERANS APPEALS

No. 91-1288

GOOL COUNTS, APPELLANT,

V.

JESSE BROWN,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

On Appeal from the
Board of Veteran's Appeals
(Decided May 27, 1994)

David Ewing was on the brief for appellant.

Mary Lou Keener, General Counsel, Norman G. Cooper, Assistant General Counsel, David W. Engel, Deputy Assistant General Counsel, and Adam K. Llewellyn were on the pleadings for the appellee.

Before KRAMER, FARLEY, and MANKIN, Judges. FARLEY, Judge, concurring in the result, and MANKIN, Judge, concurring in part and dissenting in part, file separate opinions.

KRAMER, Judge: Appellant, Gool Counts, appeals the April 15, 1991, decision of the Board of Veterans' Appeals (BVA or Board) which determined that new and material evidence has not been submitted to

reopen appellant's claims of entitlement to service connection for residuals of an eye injury, a neck injury, a left hip injury, a left leg injury (other than the left knee scar), and a hiatal hernia. Appellant served on active duty from July 1943 to December 1945. This Court has jurisdiction under 38 U.S.C. § 7252(a). In addition to the specific determination by the BVA, appellant's brief also raises the issue of a violation of the VA's duty to assist and the issue of clear and unmistakable error (CUE). Inherent in the former, in part, is the question of the scope of such duty in relation to private records under 38 U.S.C. § 5107(a) and 38 C.F.R. § 3.159 (1993). For the reasons set forth below, the Court affirms the BVA decision. The relevant facts are discussed in the context of each issue.

I. New and Material Evidence

Pursuant to 38 U.S.C. § 5108, the Secretary must reopen a previously and finally disallowed claim when "new and material evidence" is presented or secured with

respect to that claim. See 38 U.S.C. § 7104(b). On claims to reopen previously and finally disallowed claims, the BVA must conduct a "two-step analysis" under section 5108. Manio v. Derwinski, 1 Vet.App. 140, 145 (1991). First, it must determine whether the evidence presented or secured since the prior final disallowance of the claim is "new and material." If it is, the Board must then review the new evidence "in the context of" the old to determine whether the prior disposition of the claim should be altered. See Jones (McArthur) v. Derwinski, 1 Vet.App. at 210, 215 (1991).

> The Court recently synthesized the applicable law as follows:
>
> > "New" evidence is that which is not merely cumulative of other evidence of record. "Material" evidence is that which is relevant to and probative of the issue at hand and which, as this Court stated in Colvin [v. Derwinski, 1 Vet.App. 171, 174 (1991)],. . . must be of sufficient weight or significance (assuming its credibility) that there is a reasonable possibility that the new evidence, when viewed in the context of all the evidence, both new and old, would change the outcome.

Cox v. Brown, 5 Vet.App. 95, 98 (1993); see also Justus v. Principi, 3 Vet.App. 510, 513 (1992). The determination as to whether evidence is "new and material" is a question of law subject to de novo review in this Court under 38 U.S.C. § 7261(a)(1). See Masors v. Derwinski, 2 Vet.App. 181, 185 (1992); Jones, 1 Vet.App. at 213; Colvin, 1 Vet.App. at 174.

The Court finds that the BVA correctly determined that appellant had not submitted new and material evidence since the Board last denied his claims in July 1987. On appeal, appellant contended that two records from the Surgeon General's Office submitted by appellant in 1988 constitute new and material evidence. Br. at 14-16. One record shows that appellant was hospitalized in April 1944 following a motor vehicle accident, and the other reflects that a veteran with the same service number as appellant was hospitalized for chronic cystitis and stricture of the urethra in South Pacific in 1944. R. at 412, 413. The

former record is not new because the information is contained in appellant's service medical records which have been of record since the initial BVA decision in 1960. The latter record is new, but is immaterial because it is not relevant to and probative of whether appellant's conditions were incurred or aggravated in service.

II. Duty to Assist

Despite the finding that appellant did not submit new and material evidence t o reopen his claims, this Court's decisions in White v. Derwinski, 1 Vet.App. 519 (1991), and Ivey v. Derwinski, 2 Vet.App. 320 (1992), stand for the proposition that, even absent the submission of new and material evidence, the duty to asset may still be triggered under appropriate circumstances. In this light, the Court reviews appellant's contention on appeal that the VA failed to fulfil its statutory duty in developing the facts pertinent to his present claims. Br. at 18.

First, appellant points to an undated branch

separation center document which states, "A Board of Review has considered this case . . ., dated 10 Sep[tember] 1945. . . Its findings indicate that hospitalization for further study, treatment, and/or disposition is necessary," R. at 247, and he argues that this language suggests that documents are missing from the record on appeal, Br. at 14-19. The bottom if this separation center documents indicates a final diagnosis of "[n]asopharyngitis, acute, mod[erately] s[e]v[eve]." R. at 247. Subsequent hospital records, also included in the record on appeal, contain an entry dated December 10, 1945, which states that appellant had complained "[f]or the past five days. . . of a sore throat, hoarseness, coughing, running nose, pain in the chest interiorly and pain in the back." R. at 250. Another entry, dated December 11, 1945, notes, "Temperature Pulse Normal. Patient has recovered from nasopharyngitis acute catarrhal moderate. He has not complaints and is filing fine. Discharge to [s]eparation [c]enter." Id. Upon

reviewing these records, the Court finds that the duty to assist has not been breached. There has been no showing that any records, either missing or described in this paragraph, relate to a disability for which appellant is presently seeking benefits, and no such relationship can be perceived on the face of the described documents. furthermore, there are records which postdate the separation center document which show that the hospitalization deemed necessary in such document not only took place, but that the the end of such hospitalization, appellant had recovered from the specified condition. R. at 250; see 38 U.S.C. § 5107(a) ("Secretary shall assist . . . a claimant in developing the facts pertinent to the claim") (emphasis added); 38 C.F.R. § 3.103(a) (1993); Godwin v. Derwinski, 1 Vet.App. 419, 425 (1991) (noting that the "duty to assist is not unlimited" and that "the duty to develop pertinent facts applies to 'all relevant facts'" (citation omitted) (emphasis added)); Gobber v.

Derwinski, 2 Vet.App. 470, 472 (1992) ("'duty to assist' is not a license for a 'fishing expedition' to determine if there might be some unspecified information which could possibly support a claim. In connection with the search for documents, this duty is limited to specifically identified documents that by their description would be facially relevant and material to the claim"); cf. FED.R.EVID. 401 (defining "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

Second, appellant states that "the record clearly indicates that x-rays were taken in the course of [his] pre-discharge physical examination. The BVA has not obtained these x-rays." Br. at 19. Appellant's predischarge examination, dated November 30, 1945, indicates "no significant abnormalities" with respect to a

chest x-ray, and notes that "x-rays of left shoulder and spine [are] essentially negative." R. at 12, 14. The Court finds that since the relevance of these documents has not been shown and is not readily apparent, the Court cannot find a breach of the duty to assist. See 38 U.S.C. § 5107(a); 38 C.F.R. § 3.103(a); Godwin, 1 Vet.App. at 425; Gobber, 2 Vet.App. at 472.

Third, appellant states that the record on appeal contains testimony that he "failed to pass a physical examination for a job with Northern Pacific Railroad immediately following discharge [, R. at 177-78], but the VA evidently made no attempt to [ob]tain the record of this examination." Br. at 19. The Court notes that appellant also testified "I have tried to obtain the records from them but they are not longer available." R. at 178. Under these circumstances, the Court cannot find a breach of the duty to assist where appellant acknowledges their unavailability. Cf. Porter v. Brown, 5 Vet.App. 233, 237

(1993) ("VA had not duty to seek to obtain that which did not exist").

Fourth, appellant points to statements from private physicians, R. at 326, 330 and states that while the "BVA relied upon [these] letters, [it] did not request their complete records." Br. at 19. The Court notes that the statements referenced by appellant primarily address his back condition, with one also "explain[ing]" that his left hip pain was secondary to his back condition. R. at 326, 330. Again, the Court finds that the BVA did not violate the duty to assist where appellant made no showing as to the relevance of these records and their relevance is not readily apparent since the issue of entitlement to service connection for appellant's back condition was not before the BVA and is not presently on appeal. In addition, by their description, it appears hat such records would be merely cumulative of the letters already of record. See 38 U.S.C. § 5107(a); 38 C.F.R. § 3.103(a); Godwin, 1

Vet.App. at 425; Gobber, 2 Vet.App. at 472.

Appellant's third and fourth arguments pertain to the VA's alleged failure to assist appellant in procuring private records. Since appellant does not aver that he specifically requested the VA, at any time, for assistance in obtaining these private documents, his arguments raise the underlying issue of the scope of the VA's duty to assist in obtaining them.

A review of this Court's jurisprudence reveals a lack of clarity in specifying the obligations of a claimant and of the VA regarding the obtaining of private records once the duty to assist is triggered, either with respect to an original claim or a claim for reopening. See Murphy v. Derwinski, 1 Vet.App. 78, 82-83 (1990) (Court stated, "[I]f private medical, hospital, employment or other civilian records [as indicated on the claimant's application] would assist the development of 'the facts pertinent to the claim[,]' the Secretary would be able to request them from

the claimant or, upon authorization, obtain them directly," but ordered that if, on remand, the BVA concluded that the claim was well grounded, the Secretary must "secure and review" the claimant's post-service hospitalization records); Littke v. Derwinski, 1 Vet.App. 90, 92-93 (1990) (Court stated that where the record before the BVA is incomplete and the veteran listed recent private medical examinations in his substantive appeal, "[a]t a minimum, the VA had a duty to advise the veteran to submit the results of his private medical examination and to make them part of the record on appeal," but directed the BVA to remand the case to the agency of original jurisdiction with instructions to obtain the private medical records and a new examination if existing information was inadequate); Godwin, 1 Vet.App. at 425 (Court stressed the requirement that the records be "relevant," and that the Secretary respond "one way or the other" to the claimant's specific request for assistance, including where

appropriate, why information requested is not relevant so that the claimant "will have the opportunity to try to convince VA that the information he seeks is relevant"); White, 1 Vet.App. at 521 (while stating that the "statute, 38 U.S.C. § 5107(a), does not explicitly require the Secretary to assist a veteran in obtaining private records[,]. . . [t]he regulation, 38 C.F.R. § 3.159(b), is broader than the statute, and does require the Secretary to help the veteran obtain private records," the Court's decision directing the BVA, on remand, to obtain private records can be read as relying only on the fact that the claim was well grounded, not on the fact that the veteran had requested and authorized the VA to obtain such private records); Schafrath v. Derwinski, 1 Vet.App. 589, 593-95 (1991) (while the facts indicate that the veteran requested assistance in obtaining VA records, the Court stated that in disability rating reduction cases, the VA's duty to assist extends to obtaining a complete medical history "whether

or not the claimant requests a particular record"); Ivey, 2 Vet.App. at 323-24 (although the veteran did not request his private records, the "evidence of record and before the VA raised enough notice of pertinent private medical records to trigger the duty to assist" to obtain such records and a medical opinion); Culver v. Derwinski, 3 Vet.App. 292, 297 (1992) (same as Ivey); cf. Murincsak v. Derwinski, 2 Vet.App. 363 (1992) (Court held that where the VA is put on notice of the existence of relevant Social Security Administration records, 38 U.S.C. § 5107(a) requires the VA to assist in acquiring such records).

In an attempt to clarify our jurisprudence, the Court begins with the relevant language of the statutory and regulatory bases for the VA's duty to assist:

> **§ 5106 Furnishing of information by other agencies**
>
> The head of any Federal department or agency shall provide such information to the Secretary as the Secretary may request for purposes of determining eligibility for or amount of benefits, or verifying

other information with respect thereto.

38 U.S.C. § 5106.

§ 5107. Burden of proof; benefit of the doubt

(a) . . . a person who submits a claim for benefits . . . shall have the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well-grounded. The Secretary shall assist such a claimant in developing the facts pertinent to the claim. Such assistance shall include requesting information as described in section 5106 of this title.

38 U.S.C. § 5107 (emphasis added).

§ 3.159 [VA] assistance in developing claims.

(a) Although it is the responsibility of any person filing a claim for a benefit . . . to submit evidence sufficient to justify a belief in a fair and impartial mind that the claim is well grounded, the [VA] shall assist a claimant in developing the facts pertinent to his or her claim. . .

> (b) When information sufficient to identify and locate necessary evidence is of record, the [VA] shall assist a claimant by requesting, directly from the source, existing evidence which is either in the custody of military authorities or maintained by another Federal agency. At the claimant's request, and provided that he or she has authorized the release of such evidence in a form acceptable to the custodian thereof, the [VA] shall assist a claimant by attempting to obtain records maintained by State or local governmental authorities and medical, employment, or other non-government records which are pertinent and specific to the claim.

38 C.F.R. § 3.159 (emphasis added).

The statute, 38 U.S.C. § 5107(a), speaks in terms of developing all pertinent facts, including obtaining information in the possession of the Federal Government. In addition to section 5106 facts, the regulation, 38 C.F.R. § 3.159, speaks in terms of obtaining pertinent non-federal records. The regulation is also more specific than the statute in that is specifies a process, involving the claimant's request and authorization, by which to obtain the VA's assistance in securing non-section 5106 facts. In

sum, the statute, in part, directs what non-section 506 facts to develop, i.e., pertinent facts, and the regulation directs how to obtain them. Since the statute encompasses the development of all pertinent facts, including those not covered by § 5106, and the regulation simply sets forth the process by which non-section 5106 facts are obtained, there is no inconsistency between them. See 38 U.S.C. § 7261(a)(3)(C) (empowering the Court to "hold unlawful and set aside . . . regulations issued or adopted by the Secretary, the [BVA], or the Chairman of the Board found to be . . . in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right"); see, e.g., Talley v. Derwinski, 2 Vet.App. 282, 286-87 (1992) ("in view of th[e] direction in [38 U.S.C.] § 1521(a) [that the Secretary shall pay to each veteran. . . who is permanently and totally disabled], the Secretary's authority in 38 U.S.C. § 501(a). . . to 'prescribe . . . regulations . . . consistent with' the authorizing laws allows the Secretary

to prescribe regulations providing for determinations of permanent and total disability based in whole or in part upon subjective criteria"); Tomlin v. Brown, 5 Vet.App. 355, 357 (1993) (Court construed 38 C.F.R. § 20.201 as imposing no technical formal requirements for a Notice of Disagreement beyond the requirements set by 38 U.S.C. § 710-5(b)(2)); Lorenzano v. Brown, 4 Vet.App. 446, 449 (1993) (Court held that the definition of "service" in 38 C.F.R. § 3.307(a)(1) was consistent with the plain meaning of 38 U.S.C. § 1112(a)).

Giving effect to the language of the regulation, the following construct emerges which delineates the scope of the VA's duty to assist in obtaining non-section 5106 records: if the claimant wants the VA to consider documents not in the possession of the Federal Government, the claimant must (1) furnish them to the VA, or (2) request the VA to obtain them, provide an appropriate release for such purpose, and demonstrate how

the documents are relevant to the claim.

Turning to the case at issue, because appellant did not raise before the BVA the issue of whether he improperly had not been notified of the requirements of 38 C.F.R. § 3.159(b), it is open to the question whether the issue if ripe for review at this time. Cf. Rosalinas v. Brown, 5 Vet.App. 1, 2 (1993); Herzog v. Derwinski, 2 Vet.App. 502, 503 (1992). Assuming that the issue is properly before the Court, the Court notes that the same due process considerations underlying the Court's decision in Thurber v. Brown, 5 Vet.App. 119 (1993), require that notice be provided to a claimant as to that claimant's obligations under 38 C.F.R. § 3.159(b) with respect to obtaining non-federal records. See Thurber, 5 Vet.App. at 122-126 (Court held that due process considerations and the VA's duty to assist required that where the BVA relies, in rendering a decision, on any evidence developed or obtained by it subsequent to the issuance of the most recent

Statement of the Case or Supplemental Statement of the Case, or where the BVA becomes aware of evidence favorable to the claimant in the course of developing or obtaining evidence, it shall provide the claimant with notice of, and an opportunity to respond to, such evidence); Douglas v. Derwinski, 2 Vet.App. 103, 110 (1992); Douglas v. Derwinski, 2 Vet.App. 435, 442 (1992) (en banc); see also 38 C.F.R. § 3.103 (providing "procedural due process and appellate rights" to the claimant, including the "right to written notice of the decision made on his or her claim"); Bernard v. Brown, 4 Vet.App. 384, 394 (1993) (Court held that when the Board addresses a question not addressed by the Regional Office "it must consider whether the claimant has been given adequate notice of the need to submit evidence or argument on that question and an opportunity to submit such evidence and argument and to address that question at a hearing and, if not, whether the claimant has been

prejudiced thereby"); Godwin, 1 Vet.App. at 425 (Court stressed the requirement that the records be "relevant," and that the Secretary respond "one way or the other" to the claimant's specific request for assistance, including where appropriate, why information requested is not relevant so that the claimant "will have the opportunity to try to convince VA that the information he seeks is relevant"); Nagler v. Derwinski, 1 Vet.App. 297, 304 (1991) ("serious due process concerns would arise if the BVA reached a decision on a fee agreement which impinged upon the interests of the client without having provided the client with notice and the opportunity to be heard"); Buzinski v. Brown, __ Vet.App. __, __ No. 92-887 slip op. at 6-9 (Mar. 16, 1994) (to insure that appellant was accorded procedural due process, the Court reviewed the record to determine whether the BVA's factual finding of actual notice of a foreclosure proceeding was "clearly erroneous"); McDowell v. Brown, 5 Vet.App. 401, 405-

408 (1993) (Court analyzed the applicability of the due-process-based exceptions to the res judicata effect of a final judgment upon a certified class, including the sufficiency of notice). In this case, however, the failure of the BVA to provide such notice was harmless since the private records either were unavailable or did not constitute new evidence. See 38 U.S.C. § 7261(b) (requiring the Court to "take due account of the rule of prejudicial error"); Yabut v. Brown, 6 Vet.App. 79, 85 (1993).

III. CUE

Appellant also argued on appeal that the BVA failed to "rule on" his claim of CUE. Br. at 16; see also Reply Br. of Appellant. Appellant contends that the VA's treatment of his separation examination as "complete" and "dispositive was faulty since he "was not seen by a surgical consultant regarding his hernia," and that "the Board of Review never submitted its findings regarding his reported disabilities." Br. at 16. First, appellant's present

CUE claim does not satisfy the requirements of pleading CUE under Fugo v. Brown, 6 Vet.App. 40, 44 (1993), in that he has not demonstrated "why the result would have been manifestly different but for the alleged error[s]." Second, CUE cannot be premised upon records which appellant alleges should have been in the record at the time of the prior adjudications. See Caffrey v. Brown, __ Vet.App. __, __, No. 90-1511, slip op. at 9 (Mar. 31, 1994) ("VA's breach of the duty to assist cannot form a basis for a claim of CUE"). Third, the BVA decisions in 1984 and 1987 found no CUE in prior adjudications. While the precise nature of the CUE alleged by appellant and then considered by the BVA is unclear from the record, the Court notes that the principle of finality contained in Russell v. Principi, 3 Vet.App. 310 (1992) (en banc), precludes the endless review of the same issue. Russell, 3 Vet.App. at 315 ("Once there is a final decision on the issue of [CUE]. . ., that particular claim of [CUE]

may not be raised again.") (Citations omitted.)

IV. Conclusion

For the reasons stated above, the Court holds that the appellant has not demonstrated that the BVA committed either factual or legal error which would warrant reversal or remand. See Gilbert v. Derwinski, 1 Vet.App. 49 (1990). The Court affirms the BVA decision of April 15, 1991.

FARLEY, *Judge* concurring: I concur in the judgment and I specifically concur in the holding that the Secretary did not breach the duty to assist imposed by 38 U.S.C. § 5107(a). I write separately because I have come to the view that this Court has created a concept of 'duty to assist" which is at once to broad to be fulfilled in practice by the VA and not justifiable as a matter of statutory construction. While I applaud the courage of Judge Kramer in attempting to bring clarity to our

decisions in this area, I believe that he addresses mere symptoms rather than the systemic disease and that he applies only a "Band-Aid" when major surgery is required.

I.

The opening sentence of Part II of Judge Kramer's opinion, which discusses our jurisprudence concerning the Secretary's duty to assist under 38 U.S.C. § 5107(a), reads as follows:

> Despite the finding that appellant did not submit new and material evidence to reopen his claims, this Court's decisions in White v. Derwinski, 1 Vet.App. 320 (1992), stand for the proposition that, even absent the submission of new and material evidence, the duty to assist may still be triggered under appropriate circumstances.

Ante at__, slip op. at 3. My quarrel is not with this characterization, which is faithful to White and Ivey, but with the respective holdings in those cases.

Although White was severely cabined by limiting language in the body of the opinion ("the issue. . . [is] a very narrow one"), 20/20 hindsight reveals overly broad

language in the conclusion which, having been on the panel, I now wish I had challenged at the time. But if White did stretch 38 U.S.C. § 5107(a) a bit, Ivey warped it completely out of shape in holding that "[w]hile the evidence submitted by the veteran was inadequate to reopen his claim it was sufficient to trigger the duty to assist." 2 Vet.App. at 322. Despite the absence of a pending claim, the Ivey majority faulty the Secretary for breaching the statutory duty to assist by failing to obtain records and failing to create evidence by generating a medical opinion. This holding stands without any supporting authority and for good reason: there isn't any.

The concurring opinion in Ivey was more imaginative. It invented a "well-grounded claim to reopen" a claim and then attempted to set it in stone, if not in statute, by repeating variations of the phrase over and over (see 2 Vet.App. at 324, 326, 327, 328, and 330). The concurring opinion then decrees, again without any

benefit of statutory support, a "lower threshold for satisfying the requirement of a well-grounded claim" to reopen and would impose a duty to assist merely because a prior hospitalization was mentioned. In my view, the majority and concurring opinions in Ivey are not consistent with 38 U.S.C. § 5107(a).

That the Ivey version of duty to assist is now virtually limitless can be seen from a sentence in a recent panel opinion in Caffrey v. Brown, __ Vet.App. __, __, No. 90-1511, slip op. at 8 (Mar. 31, 1994): "The duty to assist may arise when a claimant simply refers to private medical examinations or treatments without making a specific request." It is now law that a mere reference to prior treatment or hospitalization will be deemed to have given rise to the statutory duty to assist even when no claim is pending. The next step will be a holding that the Secretary is required to get records whether or not a veteran ever mentions private medical examinations or

treatment. In the short space of three years we have all but created a form of strict liability for which I can find no basis in law, fact, or reason.

II.

For me, the proper analysis is simple and in keeping with the "chronological obligations" which we have held are established and allocated by 38 U.S.C. § 5107. See Schroeder v. Brown, 6 Vet.App. 220, 224-25 (1994); Suttmann v. Brown, 5 VEt.App. 127, 132 (1993); Ivey, 2 Vet.App. at 327 (Steinberg, ., concurring); Murphy v. Derwinski, 1 Vet.App. 78, 81 (1990); Gilbert v. Derwinski, 1 Vet. App. 49, 55 (1990).

A claimant has the initial burden of "submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded. The Secretary shall assist such a claimant in developing the facts pertinent to the claim." 38 U.S.C. § 5107(a)." Godwin v. Derwinski, 1 Vet.App. 419, 425 (1991); see also Grivois

v. Grown, 6 Vet.App. 136, 140 (1994) ("no duty to assist arises absent a well-grounded claim."); Suttmann, supra ("Once a claimant submits a well-grounded claim for VA benefits, the Secretary is required to assist. . ."). Thus, under § 5107(a), the Secretary only has a duty to assist "such a claimant," i.e., on who has met the burden of submitting a well-grounded claim; the Secretary is not under a statutory obligation to assist one who has not submitted a well-grounded claim. Were this not so, i.e., if the Secretary is deemed to have a statutory duty to assist any and all who present claims, the "burden" imposed by Congress in § 5107(a) and stressed again in § 5107(b) would be meaningless.

Pursuant to 38 U.S.C. § 7104(b), a denied claim "may not thereafter be reopened and allowed and a claim based upon the same factual basis may not be considered." See also 38 U.S.C. § 7105(c) (if a Notice of Disagreement with a Regional Office denial is not filed within one year,

"the action or determination shall become final and the claim will not thereafter be reopened or allowed. . 1."). Since a finally denied claim can be neither reopened nor allowed, and a new claim based upon the same rejected facts cannot even be considered, it necessarily follows that the original claim is no longer well grounded under § 5107(a) because it is no longer "a plausible claim, one which is meritorious on its own or capable of substantiation." Murphy, supra. Therefore, a final denial of a claim eliminates the "prerequisite," the trigger for the imposition of the Secretary's § 5107 duty to assist. Godwin, supra.

A claimant can only reopen a disallowed claim by shouldering the burden of presenting "new and material evidence.' 38 U.S.C. § 5108. Such evidence "must" create "a reasonable possibility that the outcome would differ when the new evidence [is] considered in light of all the evidence." Justus v. Principi, 3 Vet.App. 510, 512

(1992). If a denied claimant submits new and material evidence, i.e., meets the statutorily imposed burden, the Secretary "shall reopen the claim and review the former disposition of the claim." 38 U.S.C. § 5108. As a result of the submission of new and material evidence and the statutory command to the Secretary to reopen and review, the Secretary's duty to assist "such a claimant" attaches because the "prerequisite," a well-grounded claim, once again exists: "a claim need not be conclusive but only possible to satisfy the initial burden of § [5107(a)]." Murphy, supra. If the claimant fails to meet the § 5108 burden, the claim remains finally denied and cannot be considered well grounded, and I can find no statutory basis for imposing upon the Secretary a duty to assist such a claimant.

In my view, therefore, 38 U.S.C. § 5107 does not impose a duty to assist upon the Secretary unless or until a claimant presents a well-grounded claim. Similarly, unless

or until a finally-denied claim has been reponed upon the submission of new and material evidence under 38 U.S.C. § 5108, there is no well-grounded claim pending and no duty to assist. Of course, Congress could well create and impose upon the Secretary a universal duty to assist any and all claimants by eliminating the "burden" language in 38 U.S.C. § 5107(a) and (b), and further require the Secretary to assist, upon request, all claimants whose claims have been finally denied in gathering new and material evidence. Such a step would certain be within the province of the legislative breach; it is no, however, within the province of this Court and because we have done so, I suggest we have gone too far.

III.

In the case presently before us, Judge Kramer does not address whether the Secretary was under a statutory duty to assist appellant and, indeed, he did not have to because of the global holding in Ivey. Relying upon 38

U.S.C. § 5107(a), he holds that, with respect to records in the possession of the government, the Secretary's duty to assist arises only when a claimant demonstrates the relevance of such records. As to records which are not in the possession of the Federal Government, Judge Kramer effectively holds that the Secretary imposed a duty to assist upon himself by promulgating 38 C.F.R. § 3.159. Focusing solely upon § 3.159(b), he decrees that the duty to assist arises only after such records have been furnished by the claimant to the VA (Query: what remaining assistance could the Secretary provide in such an instance?) or the claimant requests the VA to obtain them, furnishes a release, and demonstrates relevance. Finding that appellant filed to overcome these "relevance" hurdles with respect to both government and non-government records, judge Kramer holds that the Secretary did not breach the duty to assist imposed by 38 U.S.C. § 5107(a).

I do not disagree with Judge Kramer's

announcement of a barrier of relevance as symptomatic relief. Such a step is consistent with the burdens placed upon claimants or potential claimants by both § 5107(a) and § 5018. Indeed, the concept has been lurking in our duty-to-assist jurisprudence. For example, in Ivey, the duty to assist was held to apply to "pertinent" records (2 Vet.App. at 323), and Caffrey ruled that the VA was under a duty to obtain "evidence in view of its relevance to proper adjudication of the claim" (__ Vet.App __, __, No. 90-1511, slip. op. at 8). Unlike Judge Mankin, I am of the view that an en banc pronouncement is not required in an instance such as there where the panel opinion merely "completes the analysis" of our prior decisions. See McGinnis v. Brown, 4 Vet.App. 239, 244 (1993).

Were it not for the precedents of Ivey and its progeny, however, I would argue that Judge Kramer's analysis of 38 C.F.R. § 3.159 is incomplete in that it isolates 38 C.F.R. § 3.159(b) from § 3.159(a) which

stresses emphatically the burdens (the word "responsibility" appears twice) placed upon a claimant. More importantly, in that context there is no temporal element in § 3.159(b). Taken as a whole, the, I believe that § 3.159 is consistent with the "chronological obligations" holding of Gilbert, supra: the Secretary has a duty to assist a claimant in retrieving any identified records but only after the claimant has met the "responsibility" mentioned two times in § 3.159(a), i.e., there is pending an original well-grounded claim under § 5107(a) or a reopened well-grounded claim under § 5108.

IV.

The Secretary did not violate a statutory or regulatory duty to assist in this case. But for our existing precedential decisions, I would hold that, as a matter of law, there was no statutory duty to assist because no well-grounded claim was pending. To the extent that our duty-to-assist jurisprudence presently compels a different result,

I respectfully suggest to our bench and bar that the emperor we have created has no statutory clothes.

MANKIN, *Judge*, concurring in part and dissenting in part: I concur in the result; however, I emphatically do not agree with Judge Kramer's contravention of precedent in his unabashed attempt to redefine the duty to assist in Part II of the opinion. Judge Kramer concludes, and I agree, that because the appellant has not demonstrated the relevance of the private medical records, the Secretary did not breach the duty to assist imposed by 38 U.S.C. § 5107(a). However, where I diverge from Judge Kramer is with his inappropriate attempt to formulate a "construct...which delineates the scope of the VA's duty to assist in obtaining non-section 5106 records." Ante at __, slip. op. at 8.

My disagreement with this "construct" is two-fold. First, because this case can be disposed of on the relevancy

issue, there is no need to enforce 38 C.F.R. § 3.159(b) (1993). Judge Kramer himself admits that "because [the] appellant did not raise before the BVA the issue of whether he improperly had not been notified of the requirements of 38 C.F.R. § 3.159(b) (1993), it is open to question whether the issue is ripe for review at this time." Ante at _ , slip op. at 8. Second, even if the issue were ripe for review and even if these private medical records were deemed to be relevant, such a "construct" as found in Judge Kramer's opinion would best come from an en banc panel since it directly contravenes Court precedent. See, e.g., Littke v. Derwinski, 1 Vet.App. 90 (1990); Ivey v. Derwinski, 2 Vet.App. 320 (1992); Culver v. Derwinski, 3 Vet.App. 292 (1992); Caffrey v. Brown, __ Vet.App. __, No. 90-1511, Mar. 31, 1994). These cases explicitly do not require that the claimant either furnish the records to the VA or specifically request that the VA procure private medical records before the duty to assist is triggered.

Therefore, Judge Kramer, in effect disregards the Court's prior conclusions--even ones as recent as March, 1994. As my colleagues have warned, "the Court should avoid making 'overly broad pronouncements that are [not] warranted by the facts of this specific case.'" Selley v. Brown, 6 Vet.App. 196, 200 (1994) (Steinberg, J., concurring) (quoting Lasovick v. Brown, 6 Vet.App. 141, 152 (1994) (Ivers, J., concurring in part and dissenting in part). Having decided that the duty to assist in this case was not violated, Judge kramer should have ended his opinion there. The remainder of Judge Kramer's analysis in Part II of the opinion, including his formulation of a "construct" in regard to the VA's duty to assist in obtaining non-section 5106 (i.e. private medical) records, is dicta. While I concur in the result, I do not share Judge Kramer zeal to limit the VA's duty to assist.